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No. _____

In The

Supreme Court of the United States

October Term, 1993

AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and KEITH MILTON RHINEHART, a single person,

Petitioners,

v.

WASHINGTON STATE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Does U.S. CONST. amend. XI bar actions under 42 USC 1983 or under the 14th Amendment between a state and its citizens? No.

PARTIES TO THE PROCEEDING

All parties are fully set forth in the caption of this matter, produced on the cover of this petition.

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APPENDICES

A. **OPINION SOUGHT TO BE REVIEWED AND SUBSEQUENT ORDERS**

1. Opinion of the United States District Court of the Western District of Washington at Seattle dated August 28, 1991 (Case # C91-736R)

2. Order denying Plaintiff's motion for reconsideration, entered October 15, 1991.

3. Memorandum opinion of the United States Court of Appeals for the Ninth Circuit, filed February 15, 1994.

B. **CONSTITUTIONAL PROVISIONS CITED**

1. UNITED STATES CONSTITUTION, 11TH AMENDMENT

2. UNITED STATES CONSTITUTION, 14TH AMENDMENT

3. UNITED STATES CONSTITUTION, ART. III, SEC. 2

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

THESE ARE SET FORTH IN APPENDIX A AND INCLUDE: U.S. District Court for the Western District of Washington at Seattle, cause # C91-736R, Order Granting Defendant's Motion to Dismiss and Award of Attorneys Fees (8/29/91); Order Denying Plaintiff's Motion for Reconsideration (10/15/91); Memorandum opinion of the U.S. Court of Appeals for the Ninth Circuit, No. 91-36278 (2/15/94).

GROUNDS UPON WHICH JURISDICTION OF U.S. SUPREME COURT JURISDICTION INVOKED

Jurisdiction is conferred upon this court by 28 USC 2101 (c) and 28 USC 1257.

CONSTITUTIONAL, STATUTORY, AND COURT RULES

United States Constitution, **Amendments 11** and **14** (Appendix B).

STATEMENT OF THE CASE

THE FACTS: From 1980 to the present, plaintiffs have been engaged in litigation in the State of Washington in 6 major actions. Most of the actions involved defamation allegations against major news media in the Seattle area; various media depicted and ridiculed this small Spiritualist Church as a bizarre, mind-controlling cult that bilked its members out of personal funds and property by fraud. The Church was likened by the media to the murderous Jim Jones cult of Guyana. Plaintiffs submitted evidence of violence to Church members, as a result of the defamation. The evidence included, for example, an elderly member who was attacked with an axe on the Church premises after the news stories were published. The State court found that a possibility of harm had been demonstrated and issued protective orders. (The protective orders were upheld by This Court in *Seattle Times v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).)

These cases were never allowed to go to trial, although on two occasions the State Court declined to dismiss the actions on their merits. Instead, defendants obtained dismissal of the cases through discovery tactics that demanded the complete membership list of the Church. The cases were dismissed after the Church refused to produce its membership lists.

Twice, the State Court ruled that portions of the cases were frivolous, once at the trial level and once on appeal. Although these issues, which represented a small percentage of the total litigation, were deemed by the court to be meritless with no debatable issues, Washington State courts awarded over $100,000.00 in "reasonable" fees ($64,752.02 and $41,983.21, respectively) against this minoritarian Church. The State courts also granted a confiscatory default in the amount of $50,317.70, against the Plaintiffs, for failure to reveal the home address of two members to former attorneys for fee collection. Plaintiffs alleged substantial monetary losses exceeding the $150,000 + imposed by the State Court, and also alleged an even more substantial chilling effect against them as a result of the treatment in State Court. Plaintiffs now face a continuous threat of arbitrary State Court penalties in any action for relief filed in State Court, including dismissal of their claims and the imposition of excessive, arbitrary, punitive amounts for exercising their right to seek judicial redress for claims.

Plaintiffs have alleged violations of the Civil Rights Act, 42 USC 1983, and of Equal Protection of the Laws and Due Process of the Laws in a number of factual ways:

1. The State failed to follow its own procedural rules as to Plaintiffs;

2. The State exceeded its statutory authority in awarding terms against Plaintiffs;

3. The State failed to follow its own body of case law regarding the issues of frivolity;

4. The State failed to follow its own body of case law, which is fashioned after Federal case law, regarding the rights of litigants such as plaintiffs' rights to privacy of their membership lists;

5. The State treated plaintiffs differently from similarly situated nonreligious, non-minoritarian religious, and/or defamation litigants in dismissing plaintiffs' claims and in finding them frivolous and imposing substantial terms against them.

PROCEDURE: The defendant State of Washington brought a motion to dismiss this action on the basis that the State was immune from suit under 42 USC 1983. This motion was granted on August 28, 1991. A motion for reconsideration was denied on October 15, 1991. The case was timely appealed on November 12, 1991. This petition follows a memorandum decision denying relief, from the Ninth Circuit Court of Appeals.

FEDERAL QUESTIONS TIMELY RAISED

APPELLANTS TIMELY RAISED THE QUESTIONS HEREIN, INCLUDING THE RIGHT TO SUE THE STATE IN FEDERAL COURT DESPITE THE APPLICATION OF THE **11TH AMENDMENT**, BOTH UNDER 42 USC 1983

AND UNDER THE **14TH AMENDMENT** OF THE UNITED STATES CONSTITUTION.

The response opposing the original motion to dismiss cited authority and argument to challenge the claim of immunity in general, and specifically the claim of immunity from the application of 42 USC 1983. Additionally, the right to directly sue under the Due Process Clause was addressed as follows:

> However, if we are to assume that the court would determine that jurisdiction is not operable through the mechanism of 42 USC 1983, nevertheless, there is an independent, direct right to a cause of action based upon the clear language of the **14th Amendment of the United States Constitution.** The U.S. Supreme Court in *Shelly v. Kraemer, Mich & Mo* 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948) held, "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within this **(14th) Amendment.**" (Page 5 of 13, RESPONSE OPPOSING MOTION FOR DISMISSAL AND FOR FEES.)

The court did not, however, address the **14th Amendment** issue in finding that the action is barred by the **11th Amendment**. On October 11, 1991, the District Court denied a timely motion for reconsideration, in which plaintiffs again stated:

> The issue in this matter, whether this lawsuit is barred by the **11th Amendment** of the U.S. Constitution, rides on the crest of a dispute that has its roots in the very origin of the Statute, 42 USC 1983 *et seq.*, and in the plain language of the **14th Amendment** of the U.S.

> Constitution . . . (p.2 of 17, MOTION FOR RECONSIDERATION)
>
> . . . the *Will* case does not directly address the immunity issue from the point of view of the **14th Amendment** independently of the Civil Rights Statute . . . (p. 9 of 17, MOTION FOR RECONSIDERATION)
>
> *Will* should not be followed, or the case should be pursued under the Constitutional Provisions . . . (page 16 of 18, MOTION FOR RECONSIDERATION)

The brief to the 9th Circuit Court of Appeals in this matter, and the Reply Brief, extensively treated the discussion of the immunity issue, from both the point of view of 42 USC 1983, and the **14th Amendment.**

ARGUMENT

THE ISSUES SET FORTH IN THIS PETITION ARE IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

OVERVIEW

In the present case, **Eleventh** and **Fourteenth Amendment** issues that require a focus on the sovereignty of the Federal Constitutional System are brought before the Court for review. The power of the federal court to review actions of the State that violate the States' own citizens' constitutional rights is embodied in the **14th Amendment;** yet, although it does not literally

provide so, the **11th Amendment** has traditionally been read to make a State immune to suits by its own citizens.

The issues before the court are as significant and historical as the famous civil rights cases that overturned more than a half century of erroneous "interpretation" of the **14th Amendment** – judicially inserting the language of "separate but – " in the equality clause. For more than 100 years, the Court has judicially inserted into the **11th Amendment** a prohibition against citizens suing their own state; the amendment actually only prohibits suits against states by citizens of **another** state:

> **The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by citizens of another state, or by citizens or subjects of any foreign state.* (emph. added, 11th Amend., U.S. Constitution.)**

In this case, like the civil rights cases, the impact and protection of the **14th Amendment** has been denied to citizens. In this case, the **11th Amendment** has been interpreted to allow federal rights to be violated by a citizen's own state, with no possibility of federal court intervention. This is the result, although the **14th Amendment** purports to guarantee due process and equal protection under the laws. The result of this fabricated application of the **11th Amendment** is to convert due process and equal protection, and the civil rights legislated in **42 USC 1983** from **a promise of inalienable rights to an illusion for these litigants.**

Recent court decisions are remarkable for dissenting comments by **Mr. Justice Brennan, Mr. Justice Stevens,**

Mr. Chief Justice Marshall, and others, who have strongly questioned the application of the **11th Amendment.**

Recent court decisions in this area are also characterized by the carving of tortuous and illogical exceptions to the rule, such as decisions to allow suits for prospective relief, or the allowance of State officials as defendants if they are acting "outside official capacity" although "inside official job title."

The doctrine of applying sovereign immunity against citizens as to their own states under the 11th Amendment:

> **. . . rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect. The Eleventh Amendment bars only actions against a State by citizens of another State or of a foreign nation . . . *Welch v. Texas Highways & Public Transportation Dept.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed. 389 (1987) (Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Stevens, in dissenting opinion, at 483 U.S. 496-497.)**

1. May more than 100 years of erroneous interpretation of the Constitution be re-examined and overturned? Yes.

Virtually the only argument in favor of allowing the **11th Amendment** to bar suits by citizens against their home state is that for the past 100 years, it has been assumed to be the proper interpretation.

The court has overturned erroneous Constitutional interpretation/assumptions in the past.

This Court affirmed the constitutionality of slavery and separate but equal facilities based on racial differentiations in the notorious decisions of ***Dred Scott v. Sanford*, 60 U.S. 393 (1857)**, and ***Plessy v. Ferguson*, 163 U.S. 537 (1896)**. In *Plessy*, this court held that the **Fourteenth Amendment**

> **"could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other . . . " *Plessy*, at 544.**

Yet despite the unequivocal language used in the *Plessy* decision, this Court reversed itself 58 years later. In ***Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)**, this Court held that

> **"in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown*, at 495.**

After a thorough re-examination of the constitutionality of the issues, this Court was able to reverse a morally repugnant decision.

In the instant case, Washington State courts have repeatedly rendered decisions affecting the plaintiffs. Six separate actions by the plaintiffs have been struck down, and onerous penalties of more than **One Hundred Fifty**

Thousand dollars have been imposed against this Church that sought court protection from the false and inflammatory attacks by the major media. These penalties are so onerous that they exponentially exceed the "large" penalties that statistically are imposed against other parties. (Only 3.8% of penalties exceed $25,000 in the 9th circuit) **Otorowski, "Civility and Rule 11" Washington State Bar News, Vol. 47 No. 5, May 1993, at 24.** It is clear that such penalties may absolutely discourage litigation by minoritarian groups to enforce their rights, and indeed may annihilate such groups economically. Therefore, here in much the same manner as ***Brown***, this Court should examine the constitutional issues involved in barring suits between a State and its citizens based on the **Eleventh Amendment** and determine that the **Eleventh Amendment** contains no such language and does not bar such actions.

2. **The Eleventh Amendment does not bar federal jurisdiction of a matter between a state and its citizens.**

The language of the amendment does not mention citizens of a state.

The **11th Amendment** provides:

> **The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.**

Historically, the 11th Amendment was passed for a specific reason, not to bar citizens from suing their state of residence.

This Court's decision in ***Chisholm v. Georgia*, 2 U.S. 419 (1793)**, allowed citizens outside a state and foreign subjects who were creditors of States to collect on bonds issued to finance the Revolutionary War and the years of governance under the Articles of Confederation. Facing the financial ruin of the new Union and defeat of the Constitution, legislators enacted the **Eleventh Amendment** to protect the states from their varied creditors. ***Hollingsworth v. Virginia*, 3 U.S. 378 (1798).**

The Eleventh Amendment is a narrowly drawn exception to the general rule allowing federal court jurisdiction.

The **11th Amendment** carved an exception out of the general grant of judicial power to the federal courts. The judicial power of the United States is established by the United States Constitution, and its extent is defined by **U.S. CONST. art. III, §2,** which is as follows:

> **"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and**

> **between a State or the citizens thereof and foreign states, citizens or subjects."**

The above stated clause of the Constitution establishes a duality of jurisdiction for the Supreme Court – jurisdiction may be established because of the status of the parties, *or* because of the subjectmatter. ***U.S. v. Texas*, 143 U.S. 643 (1892).**

In 1821, this court ruled that the 11th Amendment does not bar citizens of a state from obtaining a federal forum.

In ***Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 393, 5 L.Ed. 257 (1821)**, this court ruled a citizen may sue his or her own state. ***Cohens*** involved a suit against a state of a defendant who was convicted of a crime. In finding no immunity under the **11th Amendment** in a criminal matter, the court specified that jurisdiction is first provided in cases involving constitutional questions. Alternatively, jurisdiction may be found through the controversies or characteristics of the parties to the suit.

The first class of jurisdiction occurs whenever a constitutional right or federal law has been abridged. ***Cohens*, at 292.**

> **"This clause extends the jurisdiction of the [C]ourt to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party." *Cohens*, at 378.**

Chief Justice Marshall, in ***Cohens***, considered it might be necessary to make the State itself a defendant in error. Chief Justice Marshall showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under

the Constitution and laws of the United States. *Id.* In the case at bar, the laws of the United States, **42 USC 1983**, and the Constitution of the United States, are bases of the action.

The second class of jurisdiction arises under the controversy or characteristics of the controversy of the parties involved in the case. The federal judiciary was given the power to decide matters where a state was one of the parties because it was thought that the state courts could not maintain their impartiality where the interests of their own state were at issue. ***Cohens*, at 292**. In the case at bar, the State of Washington cannot be said to be able to maintain its impartiality, because the State's own actions are at issue.

In ***Cohens*, at 391-392**, the issue was addressed and resolved as follows:

> **After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.**

***Cohens*, at 378**, concluded that Article III provides federal jurisdiction "to all [federal-question cases] without making in its terms any exception whatever, and without any regard to the condition of a party. The Court in *Cohens* also clearly revealed its understanding that the **Eleventh Amendment** was inapplicable to a suit brought by a citizen against his or her own State.

Basic principles of Constitutional interpretation support the literal interpretation of the 11th Amendment, not the fictional interpretation that now bars lawsuits such as the case at bar.

For the **Eleventh Amendment** to extend its bar from federal jurisdiction to suits between a State and its citizens, which are not expressly included in the amendment, the extension must be implied in the true meaning of the Constitution.

> The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

Cohens, **at 379-380**. The language of the Constitution and the **Eleventh Amendment** does not specifically bar actions between a state and its citizens from federal jurisdiction nor can it be said that the framers of the Constitution intended it to do so. Moreover, the **Eleventh Amendment** has been held to not bar suits initiated under the **Fourteenth Amendment**, regardless of the parties. ***Ex parte Virginia*, 100 U.S. 339 (1880)**; ***U.S. v. Board of School Com'ors of City of Indianapolis, Indiana*, 503 F.2d 68 (C.A.Ind. 1974)**, ***certiorari denied*, 421 U.S. 929**, ***on remand*, 419 F.Supp. 180**.

The true meaning and spirit, and proper interpretation, of the Constitution do not work to bar actions

between a state and its citizens. Additionally, in the instant case, federal jurisdiction may be granted solely upon the existence of questions of constitutional import, regardless of the parties to the suit.

After 100 years, this court changed its interpretation almost casually, to the present one barring suit by the 11th Amendment.

In ***Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890)**, this Court held that, in a contract action, a citizen of a state was barred from suing its own state. In that case, no federal question was presented. However, the Court's holding extended the meaning of the **11th Amendment,** by changing the analysis of this issue. The ***Hans*** Court ruled that since nothing in the Constitution *expressly* allows citizens to sue their own state, then the **11th Amendment** will be read to exclude such jurisdiction.

Thereafter, Circuit decisions that touch on the issue of suit by a citizen against his or her own state are split. ***Native Village of Noatak v. Hoffman*, 872 F.2d 1384, 1390 (J. Kozinski, dissenting) (reversed on other grounds) (9th Cir. 1989)**. Predominantly, in This Court, however, The **Eleventh Amendment** to the Constitution has now long been held to bar actions between a State and its citizens. ***Papasan v. Allain*, 478 U.S. 256 (1986)**. The rule of law concerning state sovereign immunity from suit in federal court in federal question cases depends in large part on adherence to the doctrine of *stare decisis*. ***Welch v. Texas Highways & Public Transp. Dept.*, 483 U.S. 468, 478-479 (1987)**. Although the doctrine is not rigidly observed in constitutional cases. ***Id.*, at 479.** There is no

constitutional principle of state sovereign immunity from suits by its own citizens, the **Eleventh Amendment** does not bar actions against a State by its own citizens, and this Court has not settled the issue of whether the sovereignty of the States encompasses suits by its own citizens.

In conclusion, historically, and literally, there is no basis for barring the right to sue Washington State in federal court. Yet, for the most recent 100 years, the courts have erroneously assumed this to be so.

3. Exceptions to the law that strain and twist, and dissents by eminent jurists, demonstrate the urgent need for appropriate interpretation by this Court.

In a relatively recent case that bandwagoned upon the *Hans* tradition by commenting that the **11th Amendment** has long been held to bar suits by citizens against their own state, **(*Welch v. Texas Highways and Public Transp. Dept.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), a spirited dissent on that issue was presented.** Justice Brennan argued that "[a] close examination of the historical records" demonstrates that "[t]here simply is no constitutional principle of state sovereign immunity." ***Welch*, at 480.** His dissent in ***Welch*** was the fourth time in little more than two years that four members of the Court urged that ***Hans*** and the long line of cases that have followed it be overruled, *see* ***Papasan v. Allain*, at 293 (BRENNAN, J., concurring in part and dissenting in part); *Green v. Mansour*, 474 U.S. 64, 74 (1985) (BRENNAN, J. dissenting); *Atascadero State Hospital v.***

Scanlon, 473 U.S. 234, 247 (1985) (BRENNAN, J., dissenting); *Welch*, at 478.

The principle of sovereign immunity is " 'pernicious' " because it protects States from the consequences of their illegal conduct and prevents Congress from " 'tak[ing] steps it deems necessary and proper to achieve national goals within its constitutional authority.' " *Welch*, at 487, 521 (BRENNAN, J., dissenting). Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Stevens, in the dissenting opinion in *Welch*, at 496-497, adhered to the belief that the doctrine of Eleventh Amendment sovereign immunity

> rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect. The **Eleventh Amendment** bars only actions against a State by citizens of another State or of a foreign nation; the Amendment applies only to diversity suits and not to federal-question suits. *Id.*, at 497, 509.

Since Congress had not granted federal-question jurisdiction to federal courts prior to the **Eleventh Amendment's** ratification, the Amendment was not intended to restrict that type of jurisdiction. *Id.*, at 510.

Sound precedent should produce progeny whose subsequent application of principle in light of experience confirms the original wisdom. *Id.*, at 519. Tested by this standard, *Hans* has proved to be unsound. *Ibid.* The doctrine has been unstable, because it lacks a textual anchor, an established historical foundation, or a clear rationale. *Ibid.* We should not forget that the irrationality of the doctrine has its costs. *Id.*, at 519-520. It has led to the development of a complex set of rules to avoid unfair

results. *Id.*, at 520; See, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1909) (Amendment does not bar suit if plaintiff names state official, rather than State itself, as defendant); *Edelman v. Jordan*, 415 U.S. 651 (1974) (Amendment does not bar prospective, but only retrospective relief). This doctrine, based on a notion of Kingship, intrudes impermissibly on Congress' lawmaking power. *Welch*, at 520.

This Court has recognized that the Eleventh Amendment "necessarily [is] limited by the enforcement provisions of §5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). In the instant case, the plaintiffs' constitutional rights of Due Process and Equal Protection under the law have been curtailed; yet these are inalienable rights guaranteed by the Constitution. *Missouri Pac. R. Co. v. Humes, Mo.*, 115 U.S. 512 (1885); *Munn v. Illinois*, 94 U.S. 123 (1876); *Beller v. Middendorf*, 632 F.2d 778 (C.A. Cal. 1980), *rehearing denied*, 647 F.2d 80, *certiorari denied*, 452 U.S. 905, *certiorari denied*, 454 U.S. 855, *rehearing denied*, 454 U.S. 1069; *U.S. v. Thorenesen*, 428 F.2d 654 (C.A. Cal. 1970). As a result, this Court has jurisdiction to decide the instant case based solely on the questions of constitutional magnitude involved.

Justice Brennan, in *Welch*, at 520-521 (dissenting) stated:

> **"[T]he doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, . . . the Court has aggressively expanded its scope. If**

> **this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority."**

It is time to begin a fresh examination of **Eleventh Amendment** jurisprudence without the weight of ***Hans***, that mistaken precedent and its progeny.

The continued vitality of ***Hans*** is in question both by reason of the arguments directed against it and by the actual vote in *Welch*. ***Native Village of Noatak v. Hoffman, supra*, at 1387 (reversed on other grounds).** "With the [C]ourt divided four to four and JUSTICE SCALIA declaring that he was unwilling to address ***Hans***, it is not clear how long ***Hans*** will remain good law." ***Ibid.*** While Judge Kozinski, in his dissenting opinion in ***Native Village of Noatak v. Hoffman***, did not necessarily agree with the majority's analysis of the **Eleventh Amendment** issue, he acknowledged the question is a close one, having already caused a split in the circuits. ***Id.* at 1390.**

The case which reversed ***Native Village of Noatak v. Hoffman, Blatchford v. Native Village of Noatak*, 501 U.S. ___, 111 S.Ct. 2578, 115 L.Ed.2d 686, 694 (1991)**, acknowledged the narrowness of the terms of the **Eleventh Amendment** since ***Hans***. The dissenting opinion in

Blatchford v. Native Village of Noatak 501 U.S. 700, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), at 701, stated:

> **"It bears emphasis, however, that the Court need not have compounded the error of *Hans*.**

CONCLUSION

The issues presented have not been settled by this Court and are of constitutional magnitude. The United States Supreme Court should review these serious and timely issues *consistently with the criteria set forth in Supreme Court Rules, 10.1 (c).*

Submitted this 13th day of May, 1994.

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APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and REVEREND KEITH MILTON RHINEHART, a single person, Plaintiffs, v. THE STATE OF WASHINGTON, Defendant.	NO. C91-736R ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND AWARD OF ATTORNEY FEES (Filed Aug. 29, 1991)

THIS MATTER comes before the court on defendant's motion to dismiss and request for attorneys' fees. Having reviewed the matter, together with all documents filed in support and in opposition, the court finds and rules as follows:

I. FACTUAL BACKGROUND

The Aquarian Foundation describes itself as a "minoritarian" religious institution. Reverend Keith Milton Rhinehart is the spiritual leader of the Foundation. Reverend Rhinehart has been active in litigation over the past decade, and has been involved in more than five reported cases in Washington since 1982. The Foundation

and Reverend Rhinehart are plaintiffs in this action. They claim that Washington courts have dismissed as frivolous defamation actions they have brought against media defendants, and awarded sanctions against them, because they are a "minoritarian" religion as opposed to a "majoritarian" religion. They claim that the dismissals were unwarranted, although they have not alleged facts to support their claim that the dismissals were in any way improperly motivated. They claim the dismissals violated their rights to equal protection of the laws, and have brought this discrimination action against Washington state under 42 U.S.C. § 1983.

II. DISCUSSION

A. PLAINTIFFS' CIVIL RIGHTS CLAIMS BARRED BY THE ELEVENTH AMENDMENT.

The Supreme Court has held that Congress, in passing Section 1983, did not intend to disturb the states' Eleventh Amendment immunity from civil actions brought by its citizens. *Quern v. Jordan*, 440 U.S. 332, 342 (1979). The Court held that Congress did not intend to provide a federal forum for civil rights claims against states. *Id.* The Court more recently affirmed the reasoning and holding of *Quern*, when the Court held that a civil rights action could not be brought against a state under Section 1983 in state court. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 2309 (1989). The Court has repeatedly held that "in enacting § 1983, Congress did not intend to override well-established immunities or defenses under common law . . . we can not conclude that § 1983 was intended to disregard the well-established

immunity of a State from being sued without its consent." *Will*, 109 S. Ct. at 2309-2310 (citations omitted).

The Ninth Circuit has also repeatedly held that the Eleventh Amendment bars actions against the state. *See, Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987) (an action against California Superior Court by a Californian organization is an action against the state, and barred by the Eleventh Amendment); *Montana v. Peretti*, 661 F.2d 756, 758 (9th Cir. 1981) (an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state).

Plaintiffs claim that Washington courts' dismissals of their defamation actions were improperly motivated. Plaintiffs' action against the State of Washington is barred by the Eleventh Amendment.

B. WASHINGTON IS ENTITLED TO AN AWARD OF ATTORNEY FEES.

The State of Washington requests an award of attorney fees under 42 U.S.C. § 1988 and Fed. R. Civ. P. 11. In a civil rights action brought under Section 1983, the court may, in its discretion, allow the prevailing party reasonable attorney fees under 42 U.S.C. § 1988. The Ninth Circuit has held that a prevailing civil rights defendant should be awarded attorney fees under Section 1988 "only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Patton v. County of Kings*, 857 F.2d 1379, 1381 (9th Cir. 1988), *quoting, Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (applying standard to prevailing defendant in Title VII

case); *Hughs v. Rowe*, 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* standard to prevailing defendant in 42 U.S.C. § 1988 case).

Under Fed. R. Civ. P. 11, as amended in 1983, an attorney who signs any motion in federal court warrants that the motion is well-grounded in fact, and that existing law, or a good faith argument for the extension, modification or reversal of existing law, supports the motion. Sanctions have been found to be appropriate where a claim "has no basis in the law and ignores relevant United States Supreme Court authority contrary to the position asserted." *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986) (citation omitted).

Plaintiffs claim ignores a recent Supreme Court decision affirming prior holdings that actions against a state under Section 1983 are barred by the Eleventh Amendment. Plaintiffs made no factual allegations or legal arguments making exceptions to this rule applicable to their case. Their claim is frivolous; it is without any supporting legal grounds. Attorney fees are appropriate under both 42 U.S.C. § 1988 and Fed. R. Civ. P. 11.

NOW, THEREFORE, the court orders as follows:

(1) defendant's motion to dismiss is GRANTED;

(2) defendant's request for an award of attorney fees is GRANTED, and defendant shall submit to the court a substantiation of a reasonable fee, including the time spent and proposed hourly rate.

DATED at Seattle, Washington this 28th day of August, 1991.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and REVEREND KEITH MILTON RHINEHART, a single person, Plaintiffs v. THE STATE OF WASHINGTON, Defendant.	NO. C91-736R ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

THIS MATTER comes before the court on plaintiff's motion for reconsideration. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

The Aquarian Foundation describes itself as a "minoritarian" religious institution. Reverend Keith Milton Rhinehart is the spiritual leader of the Foundation. Reverend Rhinehart has been active in litigation over the past decade, and has been involved in more than five reported cases in Washington since 1982. The Foundation and Reverend Rhinehart are plaintiffs in this action. They

claimed that Washington courts have dismissed as frivolous defamation actions they have brought against media defendants, and awarded sanctions against them, because they are a "minoritarian" religion as opposed to a "majoritarian" religion. Plaintiffs claimed the dismissals violated their rights to equal protection of the laws, and brought a discrimination action against Washington State under 42 U.S.C. § 1983.

On August 28, 1991, this court granted defendant's motion to dismiss and awarded attorney fees to defendant. Dismissal was based on defendent Washington State's Eleventh Amendment immunity to civil actions brought by its citizens in federal court. Attorney fees were awarded to defendant under 42 U.S.C. § 1988 and Fed. R. Civ. P. 11, on the grounds that plaintiffs' action had no supporting legal basis and lacked a good-faith argument for the modification of existing law. Plaintiff now moves for reconsideration of this court's order.

II. DISCUSSION

The Eleventh Amendment established a State's immunity to civil actions brought by its citizens in federal court. *See, Quern v. Jordan,* 440 U.S. 332, 342 (1979); *Greater Los Angeles Council on Deafness v. Zolin,* 812 F.2d 1103, 1110 (9th Cir. 1987); *Montana v. Peretti,* 661 f.2d 756 (9th Cir. 1981). Indeed, the Supreme Court has held that the fundamental principle of Eleventh Amendment sovereign immunity "has been among the most stable in our constitutional jurisprudence." *Welch v. Texas Highways and Public Transp. Dep't,* 483 U.S. 468, 486 (1987).

Plaintiffs' argument that States may be subject to actions brought under 42 U.S.C. § 1983 in federal court is without merit. In support of their argument, plaintiffs cite Justice Brennan's articulate dissent in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). In his discussion of a State's ability to consent to suit in state court, however, Justice Brennan noted that neither *Will* nor the Court's prior interpretations of § 1983 have abrogated States' Eleventh Amendment immunity in federal court. *Will*, 483 U.S. at 76-77 (Brennan, J., dissenting).

Plaintiffs' claim against the State of Washington is without any supporting legal grounds, and ignores recent Supreme Court decisions contrary to their position. This court's award of attorney fees was therefore proper under both Fed. R. Civ. P. 11 and 42 U.S.C. § 1988. Plaintiffs make no argument in their motion for reconsideration that has not already been considered by the court. The lack of any new argument warrants the same result on reconsideration. *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 192 (1989); *Backland v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

NOW, THEREFORE, plaintiffs' motion for reconsideration is DENIED.

DATED at Seattle, Washington this 11th day of October, 1991.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, and REVEREND KEITH MILTON RHINEHART, a single person, Plaintiffs-Appellants, v. THE STATE OF WASHINGTON, Defendant-Appellee.	No. 91-36278 D.C. No. CV-91-736-BJR MEMORANDUM* (Filed Feb. 15, 1994)

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted, August 5, 1993
Seattle, Washington

Before: BEEZER, HALL, Circuit Judges, and ARMSTRONG,** District Judge

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* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Saundra Brown Armstrong, United States District Judge for the Northern District of California, sitting by designation.

The Aquarian Foundation (Aquarian) and Keith Milton Rhinehart appeal from the district court's dismissal of their 42 U.S.C. § 1983 suit against the State of Washington and the court's award of $2,380 in attorneys fees pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 11. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

The principle that the Eleventh Amendment bars suits against a state by its own citizens "has been among the most stable in our constitutional jurisprudence." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 486 (1987); *see also Papasan v. Allain*, 478 U.S. 265, 276 (1986) (holding that Eleventh Amendment prevents suits in federal court against states absent consent to be sued).

Although 42 U.S.C. § 1983 provides a federal forum to remedy violations of civil rights, "it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *see also Quern v. Jordan*, 440 U.S. 332, 341 (1979) (holding that in passing § 1983. Congress did not abrogate state's Eleventh Amendment immunity).

Aquarian's attempt to distinguish *Will* on the ground that *Will* deals only with the interpretation of "person" in § 1983 is unavailing. *Will's* conclusion that a state is not a "person" within the meaning of § 1983 bars Aquarian's claims. *Will*, 491 U.S. at 71. *Will* specifically addresses the Eleventh Amendment issue, noting that "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity." *Id.* at 66.

Eleventh Amendment issue, noting that "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity." *Id.* at 66.

Aquarian further argues that *Will* is simply wrong. The Supreme Court's decisions are, however, unambiguous: a citizen may not sue his or her own state without that state's consent. We have also consistently held that the Eleventh Amendment bars claims against a state under § 1983. *See Conner v. Sakai*, 994 F.2d 1408, 1410 (9th Cir. 1993) (Eleventh Amendment bars inmate's suit against state); *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir. 1993) (en banc) (Congress must make abrogation of state's Eleventh Amendment immunity unmistakably clear); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 677 (9th Cir. 1991) (states are immune from suits brought by their own citizens).

We hold that the Eleventh Amendment bars Aquarian's and Rhinehart's suit against the State of Washington.

II

Aquarian also argues that jurisdiction may be founded directly on the Fourteenth Amendment. Aquarian's complaint cites § 1983 as the sole jurisdictional basis for its lawsuit. Aquarian raised the Fourteenth Amendment as a basis for jurisdiction only in its response opposing the State's motion to dismiss. No formal motion to amend was ever filed.

To the extent this issue was raised below, we note that the substantive provisions of the Fourteenth Amendment provide no clear statement of abrogation of Eleventh Amendment immunity. *Quern*, 440 U.S. at 342. We hold that the Fourteenth Amendment does not provide an independent jurisdictional basis for Aquarian's suit.

III

The district court awarded the State $2,380 in costs and attorneys fees. We review the district court's award of fees for abuse of discretion. *Price v. Hawaii*, 939 F.2d 702, 706 (9th Cir. 1991).

Aquarian argues that an action cannot be deemed frivolous if the underlying argument is supported by some amount of case law, or is based upon the plain meaning of a constitutional provision. Aquarian has failed to cite any authority to support the result sought in this case. Aquarian's "plain meaning" argument has been consistently rejected for over a hundred years. We are unpersuaded that the issue of Eleventh Amendment immunity is in any way unsettled.

The district court did not abuse its discretion in awarding attorneys fees and costs against Aquarian and Rhinehart.

IV

The State requests sanctions be imposed against Appellants for bringing a frivolous appeal. We have discretion to impose damages as a sanction. Fed. R. App. P. 38; 28 U.S.C. §§ 1912.

"An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *Wilcov v. Commissioner*, 848 F.2d 1007, 1009 (9th Cir. 1988). We and the Supreme Court have consistently rejected each of Appellants' arguments. We agree with the State that this appeal is frivolous. We therefore award the State damages of $1,000 as a sanction against Appellants, jointly and severally.

AFFIRMED.

APPENDIX 4

Constitution of the United States

AMENDMENT XI

RESTRICTION OF JUDICIAL POWERS. The judicial special power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.*

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* *Note*: Proposed by congress on March 4, 1794, and declared ratified on January 8, 1798.

APPENDIX 5

Constitution of the United States

AMENDMENT XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.